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October 21, 2011

VIA ELECTRONIC SUBMISSION

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: RIN 1210-AB52

Dear Sir/Madam:

The Bazelon Center for Mental Health Law—a national legal-advocacy organization representing children and adults with mental disorders— appreciates the opportunity to offer comments on the proposed rule (76 Fed Reg. 52475, August 22, 2011) establishing summaries of benefits and coverage under the Patient Protection and Affordable Care Act (ACA).

Glossary of Health Insurance and Medical Terms

The ACA requires that the Departments consult with the National Association of Insurance Commissioners (NAIC) and a working group of consumer and health industry stakeholders to develop a uniform glossary defining key health insurance terms. As part of this work, the NAIC and its working group recommended referencing psychiatric rehabilitation in the definition of rehabilitation services. We strongly support the definition of rehabilitation services recommended by the NAIC, and urge that it be retained in the Glossary without change.

RECOMMENDATION: Retain without change the definition of “rehabilitation services” proposed in the Glossary.

Medical Necessity

The proposed definition of medical necessity excludes a broad range of individuals who will need health care, such as those whose needs are the result of conditions such as a mental or substance use disorder, developmental disability or congenital problem. As currently drafted, the definition of medical necessity ties coverage to “illnesses” and “injuries” but not to physical and mental health conditions that may arise from causes unrelated to either an illness or injury, particularly in the case of people whose conditions are present from birth. As such, the proposed definition will undermine the non-discrimination provisions of the Affordable Care Act by permitting insurers to exclude as not “medically

necessary” otherwise covered treatments and services, the need for which arises from a condition rather than an illness or injury.

The definition also permits insurers, which are bound by both the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, to undermine the purpose and provisions of those laws, and creates a conflict with ACA Sec. 1557, the Act’s nondiscrimination provision. Nor can such a distinction be justified by ACA Sec. 1563 as a “commonly used” utilization management technique, since current insurer practices have moved away from such arbitrary distinctions in who qualifies for coverage, in order to more effectively focus on the effectiveness of treatment for a wide range of physical and mental health conditions.

This shift in marketplace practices is discussed by Professor Sara Rosenbaum of George Washington University in a recent blog article. (“Medical Necessity Definition Threatens Coverage of People with Disabilities.” Health Affairs Blog, Sept. 16, 2011 at <http://healthaffairs.org/blog>). Professor Rosenbaum calls the proposed medical necessity definition “the absolute embodiment of the very types of discriminatory practices the Affordable Care Act is intended to stop.”

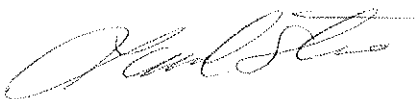
By drawing distinctions based on the means by which health status is classified and separating illness and injury from condition, the proposed rule essentially creates a binding direction on insurers and health benefit plans to adopt a thoroughly outdated definition of necessity, as the Rosenbaum article explains. This type of discredited definition threatens to cause the greatest harm to persons with physical and mental disabilities whose disability rests on a condition that is not classified as either illness or injury in standard coverage parlance.

RECOMMENDATION:

We propose that the definition of medically necessary be amended to add the word “condition” and replace “medicine” with “clinical practice” as follows “... illness, injury, disease, **condition** or its symptoms and that meet accepted standards of **clinical practice.**”

Thank you for your consideration of our views on this important matter.

Sincerely,



Laurel Stine
Director, Federal Relations